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NOT SO FAST! SCRUTINIZING THE "GUN JUMPING" PROVISIONS OF THE SECURITIES ACT UNDER THE COMMERCIAL SPEECH DOCTRINE

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INTRODUCTION

Although less menacing than its older cousin strict scrutiny, the commercial speech doctrine has become a formidable check on state and federal regulators. Foraying into markets as diverse as tobacco products and legal services, the commercial speech doctrine has proven fatal to an increasing number of laws restricting commercial advertising.[1] Indeed, this plucky young doctrine seems poised to challenge even the august federal securities regime. Fearing the fallout from such an encounter, courts and commentators have argued that the First Amendment does not shield, or only negligibly protects, speech captured by securities regulations. These proponents of a "securities exception" to the First Amendment assemble a host of theoretical justifications supporting limited judicial review for speech-restrictive securities regulations. Some argue that less rigorous First Amendment scrutiny is appropriate for laws that only incidentally capture speech when regulating a larger course of unlawful conduct.[2] Others rely on the distinct "institutional" features of the securities regime as a principled reason for a securities exception.[3]

This Note addresses some of these arguments, concluding that both Supreme Court precedent and the constitutional values animating the commercial speech doctrine undermine the case for a securities exception. The Note reasons that the Court's antipaternalistic, free market approach to commercial advertisements forces lower courts to treat regulations that prohibit securities advertisements the same as any other restriction on commercial speech. Accordingly, this

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1 *See infra* Part I.

2 *See infra* notes 58–67 and accompanying text.

3 *See infra* notes 95–103 and accompanying text.

Note provides a roadmap for determining how securities regulations would fare under the commercial speech doctrine by applying the *Central Hudson* test—the Court's current standard for evaluating limits on commercial speech[4]—to some of the most speech-restrictive rules in the federal securities regime: the "gun jumping" provisions of the Securities Act of 1933.[5]

To that end, this Note first outlines the evolution of the Supreme Court's commercial speech doctrine in Part I. Part II then describes and responds to three theoretical arguments for a securities exception to the commercial speech doctrine, concluding that a securities exception is incompatible with the Court's commercial speech jurisprudence. Although Part III.A argues that most of the federal securities regime would survive scrutiny under the *Central Hudson* test, Part III.B contends that the "gun jumping" provisions of the Securities Act are unconstitutional since they unnecessarily suppress truthful, nonmisleading speech.

I. AN OVERVIEW OF THE COMMERCIAL SPEECH DOCTRINE: KEY CASES AND DEVELOPMENTS

Before 1976, the Supreme Court did not recognize any First Amendment protections for commercial advertising. The Court's perfunctory treatment of First Amendment challenges to commercial speech restrictions is epitomized by *Valentine v. Chrestensen*.[6] In *Valentine*, the Court upheld an injunction preventing a New York City businessman from distributing handbills which advertised the exhibition of a submarine.[7] The injunction was issued pursuant to a city ordinance which prohibited the dissemination of commercial leaflets on city streets.[8] Although acknowledging that government may not unduly restrict "the freedom of communicating information and disseminating opinion" without offending the First Amendment, the Court declared that "the Constitution imposes no such restraint on government as respects purely commercial advertising."[9]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[10] the Court reversed itself, concluding that, while advertisements may be regulated in some circumstances, the First Amend-

4 *See infra* notes 20–22 and accompanying text.
5 15 U.S.C. § 77e(c) (2000).
6 316 U.S. 52 (1942).
7 *See id.* at 53–55.
8 *See id.* at 53.
9 *Id.* at 54.
10 425 U.S. 748 (1976).

ment is not blind to commercial speech.[11] In *Virginia Pharmacy*, a group of pharmaceutical consumers challenged a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs.[12] The Court struck down the statute and dismissed Virginia's claim that the commercial character of the speech at issue rendered it unprotected by the First Amendment.[13] Such an approach, the Court warned, was "simplistic"[14] since it ignored the general societal interest in the "free flow of commercial information."[15] Opening more channels of communication, the Court reasoned, will make the citizenry more informed and thus better equipped to secure their interests.[16] The alternative to this marketplace model rests upon the "highly paternalistic" assumption that people will act contrary to their own interests even when commercial information is accurate, and, therefore, the public should at times be kept ignorant of lawful, nonmisleading information.[17] Although *Virginia Pharmacy* provided little in the way of a doctrinal framework to test regulations of commercial speech, it helped lay the theoretical foundations for the Supreme Court's commercial speech jurisprudence. Faith in the marketplace and fear of the specter of paternalism have been frequently invoked by the Court when striking down government restrictions on commer-

11 *See id.* at 770.

12 *See id.* at 749–50.

13 *See id.* at 770–73.

14 *Id.* at 759.

15 *Id.* at 764.

16 *See id.* at 770. Significantly, Justice Blackmun structured his argument for the "free flow of commercial information" in *political* as well as economic terms. He stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (citations omitted).

17 *See id.* at 770.

cial speech.[18] These important themes and their impact on securities regulations will be revisited later in this Note.[19]

Four years after *Virginia Pharmacy*, the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[20] articulated its current intermediate scrutiny test for determining the constitutionality of commercial speech restrictions. *Central Hudson* involved a challenge to a regulation that banned promotional advertising by electric utilities.[21] To test the constitutionality of the regulation, the Court applied its newly minted four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[22]

Satisfied that the electric utility's advertisements were neither false nor misleading and that the state's proffered governmental interest of energy conservation was substantial, the Court focused upon how well-tailored the regulation was to the state interest.[23] Specifically, the Court scrutinized whether the complete prohibition of all advertisements for utility services was "more extensive than necessary" to secure

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18 *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." (citation omitted)); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421 n.17 (1993) ("'[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.'" (quoting DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 328 (1958))); Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) ("[Commercial] speech serves individual and societal interests in assuring informed and reliable decisionmaking." (citing *Va. Pharmacy*, 425 U.S. at 761–65)).

19 *See infra* Part II.

20 447 U.S. 557 (1980).

21 *Id.* at 558–60.

22 *Id.* at 566.

23 *See id.* at 566–70.

the interest of energy conservation.[24] In concluding that the regulation was too extensive, the Court particularly noted that the ban captured advertisements even for energy *saving* products and that the State offered little evidence demonstrating that less restrictive means—for example, requiring the utility to disclose information regarding the relative cost and efficiency of its services within the advertisements—would not just as effectively advance the state interest.[25]

The Court's march toward recognizing ever-increasing protection for commercial speech appeared to stall in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[26] In *Posadas*, a casino operator challenged a Puerto Rican law that prohibited advertisements of casino gambling directed at residents of Puerto Rico.[27] Despite the fact that advertisements for horse racing, cockfighting, and lotteries were still permitted under Puerto Rican law, then-Justice Rehnquist, writing for a majority of the Court, found that the statute was sufficiently well-tailored toward the proffered state interest of reducing the corruption and crime that accompany gambling.[28] Justice Rehnquist was unmoved by the casino operator's contention that state-sponsored counterspeech aimed at discouraging casino gambling would be a far less restrictive means of achieving the state interest. Deferring to the legislature, Justice Rehnquist asserted that Puerto Rico was within its rights to decide that such a "counterspeech policy" would be less effective than directly prohibiting casino gambling advertisements.[29] Finally, Justice Rehnquist attempted to provide a broader justification for the statute by arguing that Puerto Rico's unquestioned power to ban casino gambling itself includes the "lesser" power of prohibiting advertisements for casino gambling.[30]

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24 *See id.* at 569–71.

25 *See id.* at 570–71.

26 478 U.S. 328 (1986).

27 *See id.* at 330–31.

28 *See id.* at 342–44.

29 *See id.* at 344. Justice Rehnquist buttressed his argument by surmising that "[t]he legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.* Justice Rehnquist thus seemingly contemplates a legislature permissibly acting upon the very same "paternalistic" assumption rejected in *Virginia Pharmacy*—namely, that people will act contrary to their own best interest even when presented with accurate, nonmisleading information.

30 *See id.* at 345–46. Some commentators reasonably concluded that the "greater-includes-the-lesser" rationale coupled with the strong showing of deference to legislative judgment indicated that the *Posadas* Court had recognized a "vice" exception to

44 Liquormart, Inc. v. Rhode Island[31] signaled the return of a more rigorous examination of commercial speech restrictions. In *44 Liquormart*, the Court struck down two Rhode Island statutes prohibiting the advertisement of retail pricing for alcoholic beverages.[32] Justice Stevens, who authored the plurality opinion, relied heavily on the marketplace model articulated in *Virginia Pharmacy*. The Rhode Island statutes were especially troubling, Justice Stevens argued, because they completely foreclosed certain channels of truthful, nonmisleading commercial information.[33] Thus, they not only curtailed consumer choice, but also "obscure[d] an 'underlying governmental policy' that could be implemented without regulating speech" and, therefore, "impede[d] debate over central issues of public policy."[34]

In sharp contrast to Justice Rehnquist's opinion in *Posadas*, Justice Stevens showed little deference to legislative judgments in *44 Liquormart*. Justice Stevens stressed that the state must provide some "evidentiary support" demonstrating that the statutes directly advance the proffered governmental interest of temperance.[35] Rhode Island's "speculation or conjecture" regarding the extent of the restrictions' impact on alcohol consumption fell short of this standard.[36] Likewise, Justice Stevens noted that the statutes at issue were too extensive, since "[i]t [was] perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely

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the commercial speech doctrine. *See, e.g.*, Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 494 (1997) (describing then-Justice Rehnquist's opinion as going "well beyond *Central Hudson* by apparently carving out a 'vice' exception to the commercial speech doctrine"); *see also* United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993) (categorizing gambling as a vice activity that could be completely banned when upholding federal statutes prohibiting the broadcast of lottery advertisements).

31 517 U.S. 484 (1996).

32 *See id.* at 516.

33 *See id.* at 501–03 (plurality opinion). Indeed, the heightened scrutiny that Justice Stevens later seemed to apply in *44 Liquormart* suggests that complete bans on truthful, nonmisleading commercial speech enacted for paternalistic purposes are subject to a more exacting review than the more deferential *Central Hudson* test. *See* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 195–96 (2d ed. 2005); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring) ("[W]hen the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'").

34 *See 44 Liquormart*, 517 U.S. at 503 (plurality opinion) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)).

35 *See id.* at 505.

36 *Id.* at 507 (citing Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

to achieve the State's goal of promoting temperance."[37] Justice Stevens suggested educational campaigns aimed at encouraging temperance or direct taxation of alcoholic beverages as preferable alternatives which would survive constitutional scrutiny.[38]

In perhaps the most thought-provoking portion of the opinion, Justice Stevens explicitly rejected the "greater-includes-the-lesser" reasoning employed in *Posadas*.[39] While perhaps true as a logical syllogism, Justice Stevens argued, *Posadas*' rationale ignores the First Amendment's implicit assumption "that attempts to regulate speech are more dangerous than attempts to regulate conduct."[40] Justice Stevens appeared to ground this basic assumption in two related arguments. First, democratic societies are dependent upon the free flow of information in order to function properly and thus restrictions on speech impact the social order in a way that conduct restrictions do not.[41] Second, because speech restrictions can inhibit the dissemination of useful or profitable information, such restrictions can be more "intrusive" than prohibitions on the underlying conduct.[42] As an example, Justice Stevens contrasted a hypothetical ordinance prohibiting bicycle riding against a hypothetical ordinance prohibiting instructions on how to ride a bicycle.[43] While the latter only targeted speech, it would over time effectively serve to eliminate the activity of bicycle riding as well, since the requisite knowledge for bicycle riding would eventually be lost.[44] Accordingly, speech regulations may well be more injurious than prohibiting the conduct itself. "As a result," Justice Stevens concluded, "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct,

37 *Id.*

38 *See id.*

39 *See id.* at 510–14. Within the same section of his opinion, Justice Stevens also dispelled any doubt regarding the existence of a "vice" exception to the commercial speech doctrine: "[A] 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity." *Id.* at 514.

40 *Id.* at 512.

41 *See id.*

42 *See id.* at 511; *see also* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989) (describing a "hearer-centered" approach to the First Amendment and arguing that the SEC regulatory scheme is vulnerable to attack under such an approach).

43 *See 44 Liquormart*, 517 U.S. at 511.

44 To further support this argument, Justice Stevens endearingly quoted an ancient proverb: "'Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime.'" *Id.* at 511 n.19 (quoting THE INTERNATIONAL THESAURUS OF QUOTATIONS 646 (Rhoda Thomas Tripp ed., 1970)).

and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends."[45]

The Court strengthened and clarified its reinvigorated commercial speech jurisprudence in *Lorillard Tobacco Co. v. Reilly*.[46] In *Lorillard*, several Massachusetts regulations that restricted the sale and promotion of tobacco products were challenged.[47] Despite the weighty governmental interest involved—namely, preventing tobacco use by minors[48]—and the extensive data demonstrating the relation between tobacco advertisements and tobacco consumption,[49] the Court ruled that the regulations were unconstitutional since they lacked a "reasonable fit" with the governmental interest.[50] For example, the Court noted that one regulation which prohibited all outdoor tobacco advertisements (whether written or verbal) within 1000 feet of a school or playground in effect served as an indiscriminate, almost total ban on tobacco advertisements.[51] Such a broad sweep indicated that the state "did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations."[52] In addition to teasing out the "tailoring" portion of the *Central Hudson* test, *Lorillard* illustrates that the Court will not shy away from applying robust commercial speech analysis to speech restrictions in a heavily regulated field.[53]

45 *Id.* at 512. In this respect, the "greater-includes-the-lesser" rationale advanced by Justice Rehnquist in *Posadas* is similar to the argument made by proponents of a securities exception: that more deference is appropriate when reviewing restrictions that incidentally capture speech while regulating a larger course of conduct. As will be discussed further *infra*, both arguments are reluctant or refuse to separate the interests implicated by the speech from the underlying conduct and, instead, treat speech and conduct as the same category of activity which threatens the proffered governmental interest. *See infra* notes 58–67 and accompanying text.

46 533 U.S. 525 (2001).

47 *See id.* at 533–37.

48 *See id.* at 564.

49 *See id.* at 556–61.

50 *See id.* at 565–67.

51 *See id.* at 561–66.

52 *Id.* at 561 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

53 Indeed, the Court ruled that the Massachusetts regulations prohibiting cigarette advertisements were preempted by the federal regime established by the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1341 (2000)). *See Lorillard*, 533 U.S. at 550–51.

II. THE CASE FOR A "SECURITIES EXCEPTION": THREE ARGUMENTS

Three prominent arguments are advanced by courts and scholars for exempting securities regulations from scrutiny under the commercial speech doctrine. The first and perhaps most venerable argument posits that minimal or no First Amendment protections ought to be extended to speech that is merely a component part of a larger course of unlawful conduct. The second argument for a securities exception maintains that speech incidentally suppressed within the context of an extensive regulatory scheme, such as the federal securities regime, cannot seek refuge under the commercial speech doctrine. Finally, the third argument provocatively asserts that the institutional features of the federal securities regime should insulate speech-restrictive securities regulations from *Central Hudson* scrutiny. Because these three arguments ignore the independent constitutional values implicated by speech restrictions and have already been rejected implicitly by the Supreme Court, they must ultimately be abandoned as justifications for a securities exception.

A. Ohralik *and Commercial Speech That Is "Merely" a Component Part of a Larger Course of Conduct*

Despite nearly seventy-five years of substantial federal regulations of securities, the Supreme Court has not directly resolved whether the First Amendment embraces speech surrounding securities transactions.[54] This paucity of case law, however, has not prevented some courts and commentators from relying upon snippets of the Court's dicta as evidence that the Court has already carved out a securities exception to the standard commercial speech doctrine.[55] While most of these snippets did little more than cite securities regulations as an example where the Court will apply minimal First Amendment scrutiny,[56] a few offered broader justifications for recognizing a securities

54 *See* Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 789–90 (2007).

55 *See, e.g.*, SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988); Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 COLUM. L. REV. 474, 479 (1992) (book review) (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)).

56 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (listing "the exchange of information about securities, [and] corporate proxy statements" as instances of "communications that are regulated without offending the First Amendment" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61–62 (1973) ("On the basis of [certain unprovable] assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have

exception. For instance, in *Ohralik v. Ohio State Bar Ass'n*,[57] Justice Powell stated in dicta:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.[58]

In short, Justice Powell argued that when speech is a "component" part of certain unlawful "course[s] of conduct," then the First Amendment will not frustrate the government's legitimate objective by shielding the constituent speech from regulation.[59] Applied to securities regulations, Justice Powell's rationale moves as follows. Securities regulations target the fraudulent or otherwise harmful offering and selling of securities. However, speech is necessary to "carr[y] out" securities transactions. Therefore, government may regulate speech associated with securities transactions "without offending the First Amendment."[60]

Despite the intuitive appeal of Justice Powell's argument, it cannot be relied upon as a justification for a securities exception for at least two reasons. First, *Ohralik* was decided two years before *Central Hudson* and thus does not reflect the more robust commercial speech doctrine later developed by the Court. Second, and more importantly, Justice Powell's argument rests upon assumptions that were

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strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce." (citations omitted)). *But see* Lowe v. SEC, 472 U.S. 181, 235 (1985) (White, J., concurring) (arguing that a securities regulation governing stock market publications violated the First Amendment as applied).

57 436 U.S. 447.

58 *Id.* at 456 (citations omitted).

59 *See id.*; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("Governmental regulation that has an *incidental* effect on First Amendment freedoms may be justified in certain narrowly defined instances." (emphasis added) (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968))).

60 *See Ohralik*, 436 U.S. at 456.

implicitly rejected in *44 Liquormart* and *Lorillard.* In treating certain categories of speech as merely an incidental part of a larger "course of conduct,"[61] Justice Powell's argument does not give adequate consideration to the distinct constitutional interests implicated by the "component" speech. Rather, Powell's approach would seem to suggest that any goods derived from speech captured by securities regulations are wholly subsumed by, or dependent on, the underlying transaction. Under this approach, if regulating securities transactions is justified, then ipso facto we should be less concerned with incidentally captured speech, since the societal costs of such a regulation have already been weighed.

In fact, Justice Powell's reasoning is similar to Justice Rehnquist's "greater-includes-the-lesser" rationale in *Posadas* that was rejected in *44 Liquormart.*[62] For Justice Rehnquist, the suppression of casino gambling advertisements was justifiable because such ads were merely part of the broader activity of operating casinos—a "course of conduct" the state could undoubtedly regulate.[63] However, as *44 Liqourmart* pointed out, commercial speech implicates independent constitutional and societal interests and thus cannot be lumped together with the underlying commercial transaction for purposes of First Amendment scrutiny.[64] Indeed, *44 Liquormart* characterized regulations that targeted the sale of goods as different "*in kind* from a State's regulation of accurate information about those goods."[65] While both regulations may be aimed at the same course of conduct—for instance, fraudulent acts—only the speech restriction uniquely impacts the free flow of information. It is in this sense "that attempts to regulate speech are more dangerous than attempts to regulate conduct"[66] and thus "must be a last—not first—resort."[67]

Accordingly, it is difficult to imagine the Court affording less scrutiny to securities regulations that cover accurate, nonmisleading speech simply because the speech is a component part of a wider "course of conduct."[68] Nonmisleading advertisements for securities,

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61 *See id.*

62 *See supra* note 30 and accompanying text.

63 Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345–46 (1986).

64 *See supra* notes 39–45 and accompanying text.

65 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 (1996) (emphasis added).

66 *Id.*

67 Thompson v. W. States Med. Ctr., 535 U.S. 357, 373 (2002).

68 This is not to say that the Court will strike down securities regulations. Rather, the above analysis demonstrates that the Court cannot carve out a securities exception based upon the dictum in *Ohralik* while remaining faithful to the more robust commercial speech doctrine championed in *44 Liquormart* and *Lorillard.*

in the aggregate, are a valuable source of information that helps guarantee more informed investors and, consequently, more efficient capital markets.[69] These are precisely the same types of interests the Court appealed to in *Virginia Pharmacy* when it initially recognized First Amendment protections for commercial speech.[70]

B. Wall Street Publishing *and Speech Restrictions That Occur Within Extensive Regulatory Schemes*

In an argument related to the reasoning advanced by Justice Powell in *Ohralik*, some courts have justified a securities regulation exception on the basis of the extensiveness of the federal securities regime. For example, the First Circuit, in *Bangor & Aroostook Railroad Co. v. Interstate Commerce Commission*,[71] rejected the railroad company's contention that a section of the Interstate Commerce Act violated its free speech rights, reasoning that "the first amendment has not yet been held to limit regulation in areas of extensive economic supervision, such as the securities, antitrust, and transportation fields."[72]

More recently, the D.C. Circuit relied on a similar rationale in *SEC v. Wall Street Publishing Institute, Inc.*[73] In *Wall Street Publishing*, the Securities and Exchange Commission (SEC) sought to enjoin the publisher of a stock market magazine from violating the antitouting provisions of the Securities Act of 1933.[74] The magazine published favorable reviews of various businesses, but failed to disclose that the articles were at times written or paid for by the featured businesses themselves.[75] Although the antitouting laws required the disclosure of consideration received in exchange for promoting stock,[76] the dis-

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69 *See* Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988) ("'No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [*sic*] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value.'" (alteration in the original) (quoting H.R. REP. No. 73-1383, at 11 (1934))).

70 *See supra* notes 15–17 and accompanying text.

71 574 F.2d 1096 (1st Cir. 1978).

72 *Id.* at 1107.

73 851 F.2d 365 (D.C. Cir. 1988).

74 *See id.* at 366–67.

75 *See id.* at 367.

76 *See* Securities Act of 1933 § 17(b), 15 U.S.C. § 77q(b) (2000) ("It shall be unlawful for any person . . . to publish, give publicity to, or circulate any . . . communi-

trict court denied the injunction on First Amendment grounds.[77] The court of appeals reversed, holding that traditional speech doctrines were inapplicable, since speech relating to securities transactions "forms a distinct category of communications."[78] Accordingly, the court concluded,

> [W]e do not think it necessary for us to inquire, as we would if only commercial speech were involved, whether the government's specific regulatory objective—disclosure of consideration—is constitutionally permissible. In areas of extensive federal regulation—like securities dealing—we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme.[79]

The court in *Wall Street Publishing* seemed to support its "extensive federal regulation" rationale in two ways. First, it posited—in an argument reminiscent of Justice Powell's opinion in *Ohralik*—that restrictions targeting heavily regulated activities should not be frustrated by robust First Amendment protections simply because the targeted conduct includes component speech.[80] Second, the court warned that if heightened scrutiny were applied to speech relating to securities transactions, then it would become impossible to regulate the securities market.[81]

Like Justice Powell's argument in *Ohralik*, the "extensive federal regulation" rationale is not a viable justification for a securities exception to the commercial speech doctrine. As noted above, because speech implicates unique constitutional and societal interests, the

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cation which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.").

77 *See Wall St. Publ'g*, 851 F.2d at 368.

78 *Id.* at 373.

79 *Id.*

80 *See id.* at 372 ("Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government and regulation of such communications has been upheld." (citation omitted)).

81 *See id.* at 373. It is worth noting that the members of the Supreme Court voiced a similar fear in the context of attorney advertising. Justice O'Connor warned that disorder may well ensue within attorney discipline systems if the Court extended full commercial speech protections to attorney advertising. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 678 (1985) (O'Connor, J., dissenting). While the fact that Justice O'Connor's fear did not come to fruition does not detract from the legitimate concern for the integrity of the federal securities regime, it does suggest that such apocalyptic predictions ought to be taken with a grain of salt.

First Amendment precludes courts from affording minimal protection to speech even when it is a component part of an otherwise legitimately regulated commercial activity.[82] The court in *Wall Street Publishing* failed to articulate why these concerns should apply with any less force simply because the regulated speech "occur[s] within the umbrella of an overall regulatory scheme."[83]

Wall Street Publishing's second argument that extending First Amendment protection to communications associated with securities transactions would threaten the entire securities regulation regime is more formidable. Few scholars, even those opposed to a securities exception, advocate the entire dismantling of the well-entrenched securities regime now in place.[84] However, as discussed below, this Note argues that *Wall Street Publishing*'s slippery slope argument is mostly a red herring, since few securities regulations would likely be held unconstitutional under the Court's current commercial speech jurisprudence.[85]

Finally, the "extensive federal regulation" argument loses most of its vigor in light of the Court's frequent application of the commercial speech doctrine in other heavily regulated fields. Since the birth of the commercial speech doctrine, the Court has not felt compelled to adopt a modified standard when reviewing state and federal restrictions on advertisements relating to tobacco,[86] alcohol,[87] and pharmaceuticals.[88] Indeed, as recently as 2002 the Supreme Court, in *Thompson v. Western States Medical Center*,[89] applied an unqualified *Central Hudson* test to strike provisions of a federal statute restricting advertisements for certain pharmaceuticals[90]—a field of extensive fed-

82 *See supra* notes 62–67 and accompanying text.

83 *Wall St. Publ'g*, 851 F.2d at 373. To be fair, *Wall Street Publishing* was decided eight years prior to the Supreme Court's reinvigoration of the commercial speech doctrine in *44 Liquormart*.

84 *See, e.g.*, Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 788 (2007) (concluding that even if the Court applied the commercial speech doctrine to securities regulations, "the bulk of the regulations will remain in place, providing ample protection for investors").

85 *See infra* Part III.A.

86 *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

87 *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

88 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

89 535 U.S. 357 (2002).

90 *See id.* at 366–77.

eral regulation.[91] Interestingly, one of the proffered governmental interests supporting the restrictions in *Thompson* is strikingly similar to the "extensive federal regulation" argument found in *Wall Street Publishing*. The government asserted that the regulation was necessary "to preserv[e] the *effectiveness and integrity* of the [Food, Drug, and Cosmetic Act's] new drug approval process."[92] While the Court did not doubt the substantial nature of that interest,[93] it apparently did not consider it an adequate reason to depart from the *Central Hudson* test. Rather, the Court launched into typical *Central Hudson* analysis, concluding that the provisions were too extensive and impermissibly grounded in paternalistic assumptions.[94]

Given the Supreme Court's previous treatment of restrictions on commercial speech within heavily regulated fields, it seems unlikely that it would suddenly carve out an exception for securities regulations based solely on the extensiveness of the federal government's regulation of securities transactions. Accordingly, the "extensive federal regulation" rationale articulated in *Bangor* and *Wall Street Publishing*, without more, is insufficient to justify a securities exception to the commercial speech doctrine.

C. The Federal Securities Regime as an "Institution"

Perhaps the most persuasive argument for a securities exception can be found in Michael Siebecker's *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*.[95] Siebecker argues that, given the increasing protection of commercial and corporate political speech, the federal securities regime is in need of a principled reason for the First Amendment's apparent blindness to speech-restrictive securities regulations.[96] Building upon Frederick

91 *See* Charles J. Walsh & Alissa Pyrich, *Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform*, 48 RUTGERS L. REV. 883, 886 (1996) ("The regulatory reach of the FDA is pervasive—it controls nearly every aspect of the development and marketing of a prescription drug or medical device . . . .").

92 *Thompson*, 535 U.S. at 368 (emphasis added).

93 *See id.* at 369.

94 *See id.* at 371–77.

95 Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006).

96 *See id.* at 616, 619. Although Siebecker's analysis concerns both commercial and corporate political speech (as well as the blurry distinction between the two), this Note only considers his argument as it affects the application of the commercial speech doctrine on securities regulations.

Schauer's institutional approach theory,[97] Siebecker posits that the "institutional importance" of the securities regulation regime provides a descriptive and normative account for disparate First Amendment scrutiny of securities regulations.[98]

Following Schauer's lead, Siebecker criticizes the Court's "institutional agnosticism" and "mistaken perception that free speech is purely an individual right."[99] Rather than reviewing speech restrictions based solely on the categories of speech implicated, Siebecker argues that the Court ought to consider the "institutional settings" wherein the restrictions are imposed.[100] This "added layer of analysis" would allow courts to supplement their often ethereal doctrinal abstractions by "consider[ing] the importance of certain institutions in American life and . . . assess[ing] the effects of enhancing or restricting speech rights through the lens of those institutions."[101]

Within the setting of the securities regulation regime, the institutional approach counsels against more rigorous speech protections. Whereas certain institutions, like universities, exist to facilitate the free exchange of ideas, "the institution of securities regulation is premised upon controlled dissemination of truthful information."[102] As Siebecker explains:

> Thus, not only does the securities regulation regime represent one of the most important institutions in the United States, but its institutional role remains primarily tied to ensuring the integrity of the capital markets. Accordingly, to the extent speech restrictions remain integral to preserving market integrity, an institutional approach to the First Amendment would favor greater speech regulation in that particular setting.[103]

Despite the commonsense appeal of Schauer's and Siebecker's institutional approach, it must ultimately be rejected as an inadequate basis for a securities exception. Like the "extensive federal regulation" rationale advanced in *Wall Street Publishing*, the institutional approach appears to have already been forsaken by the Court. For example, in *Thompson*, Justice O'Connor applied straightforward *Central Hudson* analysis to strike FDA provisions with little or no concern for the institutional role of the federal food, drug, and cosmetics

97 *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

98 *See* Siebecker, *supra* note 95, at 650–51.

99 *See id.* at 649 (citing Schauer, *supra* note 97, at 1268).

100 *See id.* at 648 (citing Schauer, *supra* note 97, at 1274).

101 *Id.* at 649–50.

102 *Id.* at 654.

103 *Id.*

regime[104]—an "institution" that is as comparably well-entrenched in American society as the federal securities regime.[105] Significantly, the dearth of institutional analysis in Justice O'Connor's opinion does not appear to be due to a lack of familiarity with the institutional approach or related arguments. Justice Breyer, writing for the dissent in *Thompson*, called for a "more lenient" application of the commercial speech doctrine, reasoning that the Court's standard of review should

> reflect[] the need for distinctions among contexts, forms of regulations, and forms of speech . . . . Otherwise, an overly rigid "commercial speech" doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections.[106]

Justice O'Connor and the other members of the majority, however, evidently were not persuaded by Justice Breyer's call for a greater sensitivity to the institutional context of commercial speech restrictions. Instead, the majority opinion seemingly engaged in the same doctrinaire "institutional agnosticism" critiqued by Schauer and Siebecker.[107]

The tension arising from the competing desires for a uniform application of the commercial speech doctrine on the one hand, and for greater consideration of unique institutional characteristics on the other, is more explicitly manifested in the Supreme Court's attorney advertising cases. This should not be surprising. The legal profession is undoubtedly one of the most vital and well-established institutions within the United States.[108] The Court could not lightly ignore the

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104 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 366–77 (2002).

105 *See* John P. Swann, *Food and Drug Administration*, *in* A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 248, 253 (George Thomas Kurian et al. eds., 1998) (summarizing the century-long history of the federal food, drug, and cosmetics regime and describing it as a "key ingredient in twentieth-century U.S. history").

106 *See Thompson*, 535 U.S. at 389 (Breyer, J., dissenting).

107 *See id.* at 367–68 (finding no reason "to break new ground" since "'*Central Hudson* . . . provides an adequate basis for decision'" (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554–55 (2001))); Schauer, *supra* note 97, at 1261–64; Siebecker, *supra* note 95, at 646–47.

108 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 258 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chi. Press 2000) (1835) ("Lawyers in the United States form a power that . . . envelops society as a whole, penetrates into each of the classes that compose it, works in secret, acts constantly on it without its knowing, and in the end models it to its desires."); Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 120 (2001) (noting

significant institutional features of the legal profession when reviewing First Amendment challenges to professional rules that restrict speech. In *Bates v. State Bar of Arizona*,[109] for instance, the Court first ruled that attorney advertisements were protected commercial speech by holding an Arizona disciplinary rule that prohibited attorneys from advertising in newspapers or other media unconstitutional as applied.[110] Throughout his majority opinion, Justice Blackmun struggled to balance the unique characteristics of the legal profession that oppose extending First Amendment protections to attorney advertisements against the doctrinal purity of a contextually blind commercial speech doctrine.[111]

"the essential role that [the legal profession] has to play both in our democratic society and in the greater world").

109 433 U.S. 350 (1977).

110 *See id.* at 384.

111 *Compare id.* at 383 ("[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."), *and id.* at 384 ("[W]e recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly."), *with id.* at 365 ("[That] Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from [*Virginia Pharmacy*]. Like the Virginia statutes [which prohibited pharmacists from advertising prescription drugs], the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance."), *and id.* at 372–73 (refuting the argument that legal services are so different from fungible goods or services that advertisements for legal services are inherently misleading), *and id.* at 376–77 ("Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and unknowledgable."). In the dissenting portion of his opinion in *Bates*, Justice Powell, relying on concepts similar to Schauer's and Siebecker's institutional approach, stressed the bar's historic dominion over attorney advertising and conduct. He stated:

> The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself. . . .
>
> In this context, the Court's imposition of hard and fast constitutional rules as to price advertising is neither required by precedent nor likely to serve the public interest. . . . The constitutionalizing—indeed the affirmative encouraging—of competitive price advertising of specified legal services will substantially inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States.

The Court more or less maintained this precarious balance[112] until *Zauderer v. Office of Disciplinary Counsel*.[113] In *Zauderer*, the Court all but declared its "institutional agnosticism" towards the bar and its rules of professional conduct that restricted advertisements for attorney services. *Zauderer* involved a challenge to public reprimands issued by the Ohio Supreme Court pursuant to several disciplinary rules limiting certain forms of attorney advertisements.[114] In holding most of the provisions unconstitutional as applied,[115] Justice White's majority opinion dismissed the notion that regulations on commercial speech regarding legal services should be treated differently from commercial speech restrictions generally.[116] Nondeceptive attorney advertisements implicate the same interests as other forms of advertising.[117] Therefore, Justice White concluded, the Court ought to apply its commercial speech doctrine with equal vigor to disciplinary rules that prohibit truthful, nonmisleading attorney advertisements.[118]

Id. at 402–03 (Powell, J., concurring in part and dissenting in part).

112 *See, e.g.*, *In re* R.M.J., 455 U.S. 191 (1982); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

113 471 U.S. 626 (1985).

114 *See id.* at 629–36.

115 *See id.* at 655–56.

116 *See id.* 646–47.

117 *See id.* at 646 ("The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising—indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising.").

118 *See id.* at 646–47; *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 477–78, 479–80 (1988) (relying on *Zauderer* to strike down a prohibition on targeted, direct mailing solicitations by attorneys). *But see id.* at 491 (O'Connor, J., dissenting) ("In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that 'consumers,' and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure." (citations omitted)); *Zauderer*, 471 U.S. at 677 (O'Connor, J., concurring in part and dissenting in part) ("The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large." (citation omitted)).

Consequently, considering the Supreme Court's treatment of speech restrictions in other "institutional settings," it would be surprising if the Court relied upon the institutional nature of the federal securities regime as a reason for exempting securities regulations from the Court's traditional commercial speech doctrine. This, of course, does not take away from the institutional approach's normative punch, but it does suggest that the institutional approach alone cannot realistically support a securities exception under the Court's current commercial speech jurisprudence.

III. APPLYING THE COMMERCIAL SPEECH DOCTRINE TO THE "GUN JUMPING" PROVISIONS OF THE SECURITIES ACT OF 1933

Assuming speech-restrictive securities regulations were scrutinized under the *Central Hudson* test, the majority of such regulations would be upheld. Most securities regulations compel disclosures rather than suppress speech and thus would be treated favorably under the Court's commercial speech jurisprudence. The flexibility of the commercial speech doctrine itself also suggests that a pragmatic court could avoid toppling the entire federal securities regime while still remaining faithful to the *Central Hudson* test. However, the "gun jumping" provisions of the Securities Act of 1933 seriously threaten the core values animating the commercial speech doctrine by preventing the dissemination of truthful, nonmisleading securities advertisements. The indiscriminate and overextensive scope of the "gun jumping" provisions indicates that they are not reasonably fitted to the governmental interests and therefore are unconstitutional.

A. *The Impact of the Commercial Speech Doctrine on the Federal Securities Regime Generally*

The analysis provided above demonstrates that strong theoretical currents within the Court's commercial speech jurisprudence would resist most attempts to categorically exempt securities regulations from *Central Hudson* analysis. At least one recent lower court case has recognized the import of the Court's more robust commercial speech doctrine by rejecting the notion that securities regulations ought to be scrutinized under some unique standard of review.[119] So, assuming the Supreme Court itself extends First Amendment protections to

119 *See, e.g.*, United States v. Wenger, 427 F.3d 840, 846–48 (10th Cir. 2005) (refusing, in light of Supreme Court's more recent commercial speech cases, to follow *Wall Street Publishing* when reviewing a First Amendment challenge to section 17(b) of the Securities Act of 1933 and concluding instead that the provision ought to be "scrutinized as would any limitation on commercial speech").

commercial speech prohibited by securities regulations, what results? Will the entire federal securities regime collapse, as the *Wall Street Publishing* court feared?[120] Is chaos within the capital markets the inevitable consequence of doctrinal purity?

There are at least two reasons to think that such foreboding prophecies would not come to pass. First, the most common type of securities regulations—mandatory disclosure requirements—would probably survive scrutiny under the Court's current commercial speech jurisprudence. Within the commercial speech context, the Court has drawn an important distinction between restrictions suppressing speech and restrictions compelling speech.[121] Regulations suppressing speech directly hinder the free flow of information to consumers—the principal justification for protecting commercial speech.[122] In contrast, regulations compelling speech *increase* the amount of information in the marketplace and thus implicate less severely the First Amendment interests animating the commercial speech doctrine.[123] At times, mandatory disclosures actually seem to serve those interests, such as when "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[124] As a result, the Court has adopted a more deferential posture when reviewing regulations mandating the disclosure of accurate information.[125] Indeed, the Court has repeatedly stated its preference for compelled speech as a less restrictive alternative to prohibitions on commercial speech[126] and

120 *See* SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988).

121 *See, e.g.*, *Zauderer*, 471 U.S. at 650–51; *In re* R.M.J., 455 U.S. 191, 200–01 (1982); *see also Wenger*, 427 F.3d at 849 ("*Zauderer*, therefore, eases the burden of meeting the *Central Hudson* test. In assessing disclosure requirements, *Zauderer* presumes that the government's interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored."). In the case of protected, *non*commercial speech, the Court does not seem to draw a distinction between speech compulsion and speech suppression. *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

122 *See Zauderer*, 471 U.S. at 651.

123 *See id.* at 650–51.

124 *In re R.M.J.*, 455 U.S. at 201.

125 *See Zauderer*, 471 U.S. at 651.

126 *See, e.g.*, *id.*; *In re R.M.J.*, 455 U.S. at 203; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980); Bates v. State Bar of Ariz., 433 U.S. 350, 375, 384 (1977).

has even suggested that disclosure requirements ought to be subject to a rational basis–like review, rather than the intermediate scrutiny typically applied to commercial speech restrictions.[127]

Thus, securities regulations that compel disclosure would likely be upheld under the commercial speech doctrine.[128] Presumably, the SEC would justify these regulations by relying on the state's interest in ensuring that investors have "adequate information upon which to base [their] investment decision[s]."[129] Disclosure requirements that inject more accurate information regarding the health and activities of the issuing or reporting companies into the marketplace directly advance that interest. Moreover, because compelled disclosures target "material" information—that is, information in which "there is a substantial likelihood that a reasonable shareholder would consider it important"[130]—such regulations do not appear "too extensive" and in fact seem closely related to the state interest of promoting well-informed, knowledgeable investment decisions.

The second reason why subjecting securities regulations to commercial speech analysis would not lead to the collapse of the federal securities regime is grounded in the inherent flexibility of the *Central Hudson* test.[131] Although the analysis provided in Part II of this Note indicates that the Court is reluctant to create new tests or carve out exemptions for certain types of speech restrictions, it appears more than willing to work within the roomy parameters of the *Central Hudson* test to reach pragmatic results.[132] In this sense, Siebecker's institutional approach, understood as an "added layer of analysis,"[133] could provide the Court with a normative basis to cast a less scrutinizing eye on certain speech-restrictive securities regulations. It is difficult, therefore, to imagine the Court zealously wielding the commercial speech doctrine to shatter the federal securities regime simply because it determines *Central Hudson* is the appropriate standard of review for securities regulations that limit commercial speech.[134]

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127 *See Zauderer*, 471 U.S. at 651 ("[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

128 *See* Drury, *supra* note 84, at 785–86.

129 *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 3.4[1], at 74 (rev. 5th ed. 2006).

130 TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

131 *See* Page, *supra* note 54, at 826–27; Suzanna Sherry, *Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3, 6 (2004).

132 *See* Sherry, *supra* note 131, at 6.

133 *See* Siebecker, *supra* note 95, at 649.

134 *See* Page, *supra* note 54, at 826–27.

B. *Applying the* Central Hudson *Test to the "Gun Jumping" Provisions of the Securities Act of 1933*

Section 5(c) of the Securities Act of 1933 broadly prohibits any communication calculated to generate an interest in securities related to an offering prior to the filing of a registration statement. This indiscriminate prohibition suppresses even accurate and nonmisleading securities advertisements. Because section 5(c)'s wide reach lacks a reasonable fit with the government interests of preventing fraud and promoting market efficiency, section 5(c) is probably too extensive, and therefore, unconstitutional under the commercial speech doctrine.

1. An Overview of Section 5(c) of the Securities Act and Related "Gun Jumping" Provisions

While the majority of securities regulations would likely survive First Amendment scrutiny, regulations that ban the dissemination of truthful, nonmisleading information are susceptible to being struck down under the commercial speech doctrine.[135] As discussed above, the Court favors disclosure over suppression[136] and is particularly suspicious of total or near-total prohibitions of accurate, nonmisleading commercial speech since "they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."[137] Moreover, this preference for disclosure over suppression and distrust of paternalism animates the federal securities regime itself.[138] Because near-total prohibitions on accurate, nonmisleading speech strike near the heart of the commercial speech doctrine and federal securities law, such prohibitions would probably not benefit from the *Central Hudson* test's flexibility but, rather, would likely endure the full force of the commercial speech doctrine.[139]

Perhaps the most vulnerable securities regulations are the "gun jumping" provisions found in the Securities Act of 1933, which prohibit various types of communications during the prefiling period. Pursuant to section 5(c) of the Securities Act, persons may not engage in any offers to purchase or sell securities prior to filing a registration

135 *See* Drury, *supra* note 84, at 780–81.

136 *See supra* notes 121–27 and accompanying text.

137 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

138 *See* Basic Inc. v. Levinson, 485 U.S. 224, 234 (1988) (rejecting the argument that investors would be overwhelmed by certain disclosures, since "[d]isclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress").

139 *See supra* note 33 and accompanying text.

statement with the SEC.[140] This prohibition has been interpreted to take effect approximately thirty days prior to the filing of the registration statement[141] and to encompass communications that are "calculated to arouse investor interest in the securities to be offered."[142] Although section 5(c)'s broad scope does not capture "factual business information" that is not directed toward investors[143]—such as a business' routine product advertisement—it could reach communications that contain information related to the expected offering.[144] Such communications might be construed as cultivating a buying interest in the security and, thus, could constitute a prohibited "gun jumping" offer to buy or sell the security.[145]

In an attempt to clarify the distinction between prohibited "gun jumping" communications and "legitimate pre-filing publicity," the SEC amended Rule 135.[146] The amended rule provides a safe harbor for certain prefiling notices regarding a proposed offering made by the issuer.[147] To qualify for the Rule 135 safe harbor, the prefiling communication must contain a disclaimer and be limited to specified categories of information.[148] For instance, the safe harbor would shield a company's press release regarding its forthcoming offering if it only contained the company's name and the expected timeframe for that offering.[149] Although Rule 135 permits the inclusion of the offering's "basic terms" within the prefiling communication,[150] there is authority arguing that "basic terms" does not include the price of the shares unless the offering is a rights offering to existing sharehold-

140 *See* Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (2000) ("It shall be unlawful for any person . . . to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title."). *See generally* HAZEN, *supra* note 129, § 2.3[1], at 83–85 (describing prefiling period prohibitions).

141 *See* HAZEN, *supra* note 129, § 2.3[1], at 83.

142 *Id.* § 2.3[2], at 86. Note that this broad interpretation of section 5(c) would likely frustrate any attempt to construe the statute as targeting conduct rather than speech. As Professor Hazen notes, for the purposes of section 5(c), "[t]he concept of offer is not limited to contract law doctrine." *Id.*

143 *See* 17 C.F.R. § 230.169 (2007).

144 *See* HAZEN, *supra* note 129, § 2.3[2], at 86–88.

145 *See id.*

146 *See id.* § 2.3[2], at 87.

147 *See* 17 C.F.R. § 230.135.

148 *See id.*

149 *See id.* § 230.135(a)(2).

150 *See id.*

ers or an offering to employees of the issuer.[151] Additionally, the same press release would lose the protection of Rule 135 by merely adding the name of the underwriter.[152] Indeed, Rule 135 does not cover *any* communications made by the underwriter, "reflect[ing] a view that any publicity initiated by an underwriter . . . is likely to be viewed as the type of sales effort that section 5(c) was designed to prevent."[153] Even if a company's prefiling communications fall outside the terms of Rule 135 and the other safe harbors, however, they do not automatically constitute section 5(c) violations. Instead, the communications and their surrounding circumstances would be subjected to a factual analysis in order to determine whether the company engaged in an illegal selling effort.[154] As a practical matter, however, the failure to adhere to the requirements of Rule 135 will usually be treated as a section 5(c) violation.[155]

2. Applying the *Central Hudson* Test

The formative securities case, *Carl M. Loeb, Rhoades & Co.*,[156] provides an excellent test case to analyze the constitutionality of the "gun jumping" rules under the commercial speech doctrine. In *Loeb, Rhoades*, an underwriter issued a press release publicizing the upcoming initial public offering of a real estate venture based in Florida.[157] The press release identified the nationwide investment banking group handling the offering as well as the issuer's principal officers.[158] Additionally, during an interview with reporters, an agent of the underwriter disclosed that the securities would sell for around ten or eleven dollars per share.[159] Following the press release and interview, several investment firms and individual investors expressed an underwriter

151 *See* HAZEN, *supra* note 129, § 2.3[3], at 89–90.

152 *See* 17 C.F.R. § 230.135(a)(2).

153 *See* HAZEN, *supra* note 129, § 2.3[3], at 89.

154 *See id.* § 2.3[3], at 90.

155 *See* Chris-Craft Indus., Inc. v. Bangor Punta Corp., 426 F.2d 569, 574 (2d Cir. 1970) ("A checklist of features that may be included in an announcement which does not also constitute an offer to sell serves to guide the financial community and the courts far better than any judicially formulated 'rule of reason' as to what is or is not an offer. Rule 135 provides just such a checklist, and if the Rule is not construed as setting forth an exclusive list, then much of its value as a guide is lost.").

156 38 S.E.C. 843 (1959).

157 *See id.* at 843–44.

158 *See id.* at 844–46.

159 *See id.* at 846.

interest and intent to purchase the securities, respectively.[160] The underwriter, however, rebuffed these "indications of interest."[161]

This press release would likely violate section 5(c) under the current SEC rules even though the disclosures were accurate. Since the press release referred to the upcoming offering, it could not be construed as simply a routine advertisement about the issuer's products or services.[162] Moreover, it was issued by the underwriter and thus beyond the scope of the Rule 135 safe harbor.[163] Even assuming the issuer itself had distributed the press release, the publicity would remain unprotected by Rule 135, because it disclosed the name of the underwriter, the officers of the issuer, and the anticipated price of the offered securities.[164] Most importantly, the interest expressed by the various firms and individual investors indicates that the press release generated a buying interest and, therefore, constituted an illegal offer to sell.[165]

Under the *Central Hudson* test,[166] a court must first determine, as a threshold matter, whether the press release was untruthful or misleading.[167] Although the press release was factually accurate, the SEC would still likely argue that the press release was misleading. More specifically, the government may argue that incomplete—albeit truthful—disclosures may skew an investor's perception of an offering and consequently might unduly influence investment decisions.[168] This

160 *See id.* at 846-47.

161 *Id.*

162 *See* 17 C.F.R. § 230.169 (2007).

163 *See id.* § 230.135.

164 *See id.* § 230.135(a)(2).

165 *See Loeb, Rhoades*, 38 S.E.C. at 850-51; HAZEN, *supra* note 129, § 2.3[2], at 87.

166 This Note will assume that the press release constituted commercial speech. The rules for determining whether speech is "commercial" in character are vague and constitute a highly disputed area of law. *See, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 638–48 (1990) (criticizing the distinction between commercial and noncommercial speech for having "no justification in the real world"). However, this concern does not seem too problematic with respect to the press release at issue, since it was distributed simply to arouse investor interest in the offering and thereby help facilitate future securities transactions. This is paradigmatic commercial speech. *See* VOLOKH, *supra* note 33, at 196 (pointing out that commercial speech is "[g]enerally *speech that proposes a commercial transaction*, i.e., commercial advertising" (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983))).

167 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

168 *See Loeb, Rhoades*, 38 S.E.C. at 852–53 ("[T]he danger to investors from publicity amounting to a selling effort may be greater in cases where an issue has 'news value' since it may be easier to whip up a 'speculative frenzy' concerning the offering

would be a difficult argument to mount, however. Given other protective measures in the federal securities regime, it is difficult to imagine that the press release would deceptively induce investors into imprudent securities transactions. Before any transaction could be consummated, the issuer's statutory prospectus would have provided the market—and the individual investor—with all the prescribed material information regarding the offering,[169] including any material information already announced in the press release. Furthermore, Rule 15c2-8(b) of the Securities Exchange Act of 1934 requires the broker or dealer for an offering involving a nonreporting company[170] to "deliver a copy of the preliminary prospectus to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation."[171] This rule effectively mandates a forty-eight hour "cooling off" period, which allows the investor to read (or reread) the statutory prospectus and reconsider the offer before any commitment to purchase the securities becomes binding.[172] Thus, the requisite information—and, importantly, the market's adjustment to that information[173]—would be at the investor's disposal prior to entering any agreement to purchase the shares. To be sure, there still exists some potential for deception. An investor may irrationally ignore the additional disclosures contained in the statutory prospectus and make an investment decision based solely on the information contained in the press release. This mere potential for deception, however, cannot alone justify a complete suppression of factually accurate prefiling communications like the press release.[174] Accord-

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by incomplete or misleading publicity and thus facilitate the distribution of an unsound security at inflated prices.").

169 *See* Securities Act of 1933 § 5(a)–(b), 15 U.S.C. § 77e(a)–(b) (2000). Besides the statutory prospectus, the issuer or underwriter could also disseminate a significant amount of supplemental information regarding the offering in the form of "free writing prospectuses" prior to any sale of securities. *See* 17 C.F.R. § 230.433; *see also* JOHN C. COFFEE, JR. ET AL., SECURITIES REGULATION 117–18, 120–21 (10th ed. 2007) (describing how SEC rules governing free writing prospectuses permit the distribution of a wide array of communications during the "waiting period").

170 This would predominantly include issuers making an initial public offering, such as the real estate venture in *Loeb, Rhoades*. *See* COFFEE ET AL., *supra* note 169, at 122.

171 17 C.F.R. § 240.15c2-8(b).

172 *See* COFFEE ET AL., *supra* note 169, at 122.

173 *See* Drury, *supra* note 84, at 776 (describing how amateur investors are protected by the market, which uses its "collective data, experience, and insight . . . [to] set the market price").

174 *See In re* R.M.J., 455 U.S. 191, 203 (1982). Whereas inherently "misleading speech may be prohibited entirely," *potentially* misleading speech may not be categorically suppressed unless the "character of such statements creates a state interest suffi-

ingly, the court would likely conclude that the press release is not unprotected, false or misleading speech.

After having determined that the press release is protected commercial speech, the court would next inquire whether the proffered governmental interests justifying section 5(c) and the related regulations are substantial.[175] The SEC would likely assert two governmental interests: the prevention of fraud orchestrated by manipulative communications advertising securities offerings and the advancement of market efficiency by ensuring that investors have sufficient information to make informed investment decisions.[176] The SEC would argue that "gun jumping" undermines these interests by prompting investors to make investment decisions prior to full disclosure.

While the court would likely conclude that promoting market efficiency and preventing fraud are substantial governmental interests, it would have reason to doubt whether the "gun jumping" restrictions are well-tailored toward those ends. No doubt the SEC could marshal enough "evidentiary support" demonstrating that the restrictions directly advance the prevention of fraud by preventing prefiling advertisements for securities. The silence imposed by section 5(c) obviously makes it more difficult for issuers and underwriters to deceive investors. However, it is debatable whether that silence promotes market efficiency. Certainly markets operate more efficiently the less tainted they are by false or misleading information. On the other hand, if the free flow of accurate, nonmisleading information is the sine qua non of efficient markets,[177] it seems counterintuitive to contend that the suppression of *truthful* advertisements, such as the press release, advances market efficiency.

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ciently substantial to justify a categorical ban on their use." Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 100 (1990). Although ambiguous, the Court seems to be suggesting that potentially misleading speech can be suppressed only if the restriction is appropriately tailored—i.e., satisfies the three remaining prongs of the *Central Hudson* test. *See id.* at 106–07.

175 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

176 *See* H.R. REP. NO. 73-85, at 8 (1933); *see also* COFFEE ET AL., *supra* note 169, at 88 ("The Securities Act of 1933 has two basic objectives: (1) to provide investors with material financial and other information concerning new issues of securities offered for sale to the public; and (2) to prohibit fraudulent sales of securities."). Related to these interests are consumer confidence and the stability of the capital markets. *See* HAZEN, *supra* note 129, § 2.2[1], at 75 ("Another justification . . . is that the market participants' knowledge that full disclosure has been made instills investor confidence and hence stability which would otherwise be lacking . . . .").

177 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

However, even assuming that the "gun jumping" provisions directly advance both governmental interests, they would still likely fail the tailoring analysis due to their overextensiveness. By prohibiting *any* communication calculated to generate a buying interest in a security during the prefiling period, the provisions are "too extensive" as a means for preventing fraud.[178] Section 5(c)'s indiscriminate suppression of both truly fraudulent speech and benign advertisements, like the press release, indicates the SEC "did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations."[179] The SEC would likely counter that section 5(c)'s prophylactic nature is necessary because it is too difficult to differentiate fraudulent or misleading advertisements from harmless commercial speech. More specifically, the SEC might argue that securities advertisements are particularly ripe for fraud or manipulation since securities are intangible and derive their value from information rather than some inherent worth.[180] This potential for fraud is exacerbated by the issuing company's control over the information which shapes the market price of the securities.[181] The SEC might contend that these features warrant a prophylactic rule against securities advertisements during the prefiling period. This argument is undermined, however, by the press release at issue: most if not all its statements would be easy to verify. Moreover, it is not clear that securities advertisements are so qualitatively different from other commercial advertisements that the SEC should be excused from the conventional regulatory burden of "distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."[182] Contracts for legal services share some of the same features as securities transactions that seemingly justify a prophylactic rule: the difficulty in verifying or quantifying the value of a particular attorney's services; and the significant imbalance between the client's and the attorney's understanding of the legal matters underlying the services to be provided.[183] Yet despite these characteristics, the Court found that legal advertisements were not intrinsically distinct from advertisements for other goods or services and, consequently, refused

178 *See Central Hudson*, 447 U.S. at 566.

179 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001) (alteration in original) (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993)).

180 *See* Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 82–83 (1989).

181 *See id.* at 83.

182 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985).

183 *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 489–90 (1988) (O'Connor, J., dissenting).

to relieve state bar associations of the burden of discriminating between deceptive and nondeceptive legal advertisements.[184] Similarly, the SEC should not be able to rely on section 5(c) "simply to spare itself the trouble of distinguishing"[185] fraudulent securities advertisements from truthful, nonmisleading securities advertisements.

Furthermore, the Supreme Court has stated a clear preference for disclaimers or warnings, instead of suppression, as a method of addressing the harms attendant to potentially misleading speech.[186] Rather than enforcing a blanket ban on prefiling advertisements, the SEC could require certain disclaimers to put investors on notice.[187] These disclosures would further the federal securities regime's animating purpose[188] and, in conjunction with antifraud provisions, advance the interest of preventing fraudulent or misleading advertisements for securities.[189] Of course, even with these additional measures, completely accurate prefiling advertisements might still lead some investors to make poor investment decisions. This paternalistic concern, however, should not enable the SEC to "chok[e] off access to information that may be useful to [other] citizens."[190]

The "gun jumping" provisions also seem too extensive with respect to the governmental interest in market efficiency. The near-total prohibition on prefiling advertisements likely results in the suppression of a significant amount of completely accurate information, which would serve to increase market efficiency.[191] The SEC would probably argue that section 5(c) acts primarily to prevent false or misleading speech—which causes market inefficiencies—from reaching consumers. Its incidental impact on truthful advertising, the SEC might claim, is an unfortunate but necessary consequence of achieving that end and, on balance, results in a more efficient market than

184 *See Zauderer*, 471 U.S. at 646.

185 *See id.*

186 *See supra* notes 121–27 and accompanying text.

187 Although Rule 135 already requires a disclaimer, see 17 C.F.R. § 230.135(a)(1) (2007), more warnings could be added. For instance, the SEC could mandate that prefiling communications include a legend advising investors to read the statutory prospectus before making any investment decisions. *Cf. id.* § 230.433(c)(2)(i) (providing a model legend for free writing prospectuses, which cautions investors to "read the prospectus in [the] registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering").

188 *See* Basic Inc. v. Levinson, 485 U.S. 224, 234 (1988).

189 *See* Drury, *supra* note 84, at 782.

190 *See Zauderer*, 471 U.S. at 645 n.12.

191 *See Basic Inc.*, 485 U.S. at 234.

one in which both accurate and untruthful advertisements were permitted to enter. Given the discussion provided above, however, it is doubtful that the reviewing court would find this argument persuasive. Less restrictive disclaimers or warnings, in combination with antifraud measures, would serve to prevent the dissemination of false advertisements and help thwart investors from acting on such advertisements.[192] Furthermore, protective features unique to the securities market counsel against a hypersensitive concern over false information impairing market efficiency. Because the securities market acts as a "single market clearinghouse" that constantly processes and filters information in order "to determine if [a security is] of sufficient interest or quality," even ill-informed investors are "able to free ride on the research, expertise, and insights of the many market participants when making a purchase."[193] Consequently, a reviewing court would probably look skeptically upon any argument that the extreme reach of section 5(c) is reasonably fitted to the end of market efficiency.

CONCLUSION

When Congress passed the Securities Act of 1933, it consciously rejected the merit-based approach then followed by state blue sky laws.[194] Under the merit approach, state agencies regulated the substantive fairness of securities transactions by prohibiting deals which the "local . . . administrator deemed excessively risky, or unfair, or overly generous to the promoters."[195] The merit approach effectively substituted the investor's judgments with the government's out of fear that the investor would be unable to discern her own best interest. The Securities Act, in contrast, does not investigate the substantive fairness of a transaction but rather requires issuers to disclose all relevant information regarding the offered securities.[196] Significantly, the success of the Securities Act turns on the assumption that investors are capable of evaluating the merits of an investment opportunity if adequate information regarding the securities is available.[197]

In this sense, the basic presumption of the federal securities regime converges with the core values underlying the commercial speech doctrine. Since the Court initially recognized First Amend-

192 *See supra* notes 187–90 and accompanying text.
193 *See* Drury, *supra* note 84, at 776.
194 *See* HAZEN, *supra* note 129, § 1.2[3][A], at 22.
195 *See* COFFEE ET AL., *supra* note 169, at 62.
196 *See* HAZEN, *supra* note 129, § 1.2[3][A], at 22.
197 *See id.*

ment protections for commercial advertising in *Virginia Pharmacy*, it has repeatedly declared its faith in commercial speech's power to disseminate valuable information and in consumers' capacity to react rationally to that information. Like the Securities Act, widespread dissemination of information rather than paternalistic meddling is the modus operandi of the commercial speech doctrine.

That shared principle strongly suggests that speech-restrictive securities regulations should not be exempted from First Amendment scrutiny but instead ought to be examined under the *Central Hudson* test. While most securities regulations would probably survive *Central Hudson* scrutiny, the "gun jumping" provisions of the Securities Act would likely be struck down. By imposing an indiscriminate ban on securities advertisements during the prefiling period, section 5(c) chokes off valuable channels of communications and withholds even truthful, nonmisleading information from investors. This unnecessarily severe impact upon the free flow of information is antithetical both to the commercial speech doctrine and to the spirit of the Securities Act.